

**Limited Powers, Improved Accountability:
Saving the ICANN Experiment**

Testimony of

Alan B. Davidson, Associate Director

**Center for Democracy & Technology
<http://www.cdt.org/>**

**Before the
Senate Commerce, Science, and Transportation Committee
Subcommittee on Science, Technology and Space**

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Summary

The Center for Democracy and Technology (CDT) welcomes this opportunity to testify before the Subcommittee regarding the future of the Internet Corporation for Assigned Names and Numbers (ICANN), an issue of great importance to the management of the Internet. CDT is a non-profit, public interest organization dedicated to promoting civil liberties and democratic values online. We have participated in the last ten international ICANN meetings as advocates for mechanisms that protect the public voice in ICANN and that promote the decentralized, user-controlled vision of the Internet that has been so successful to date.

Today ICANN is at a crossroads, and in our view it is failing. Its authority over central naming and numbering functions gives it both a public trust and an enormous potential to exercise power over Internet activities. Its original conception is sound. Yet three years into its existence ICANN has not yet lived up to that original vision in key areas. Its current efforts appear likely to create a global Internet regulator with increasing powers, reduced public accountability, and a diminishing voice for the public's interests in its stewardship of public resources.

ICANN is in need of substantial reform if it is to succeed. We believe the current path to reform, while welcome, is not sufficient.

Our testimony focuses on these main points:

1. We still believe in the original concept of a non-governmental, globally representative, bottom-up technical coordination organization. The US government alone cannot forever maintain responsibility for coordination of global Internet resources. A private-sector body – but one that is narrowly focused, publicly accountable, and representative of affected interests – remains the approach most likely to reflect the needs of the Internet community.
2. ICANN has not yet lived up to that vision, and risks becoming an increasingly unaccountable global regulator of important Internet activity.
 - While ICANN was originally conceived as a narrow technical manager, it has increasingly acted as a broader policy-maker, demanding massive and detailed contracts with registries, making subjective and at times arbitrary decisions, and reducing trust that there are meaningful limits on its powers.
 - The bottom-up, consensus-oriented approach to policy development has failed to develop in key areas at ICANN, and the current reform proposal appear to retreat from that bottom-up approach.

- The voice of consumers and users is diminishing at ICANN, and the current reform process all but abandons the critical commitment to At-Large board seats as a mechanism for accountability and representation.
3. Most fundamentally, ICANN must find ways to limit its powers to promote trust. Only a truly “thin” ICANN, with real checks on its powers that people can point to and understand, is likely to gain the trust of users and of the country registries and others who have been reluctant to enter into contracts with ICANN. Only a truly focused private body will be able to create the global accountability mechanisms needed to exercise power with the trust of the global Internet community.
 4. There is a path to reforming ICANN. The hard work of ICANN’s Reform Committee makes good progress in some areas, but our testimony explains how ICANN must:
 - *Limit its power and mission* through clear delimitation of its powers and a binding review process to ensure it does not overstep those bounds.
 - *Increase accountability* through more transparent bottom-up processes.
 - *Represent user and consumer interests* in its Board and structure. CDT has in the past supported elections from among stakeholders as one method of providing representation and accountability, and others are available as well. ICANN cannot reject this mechanism without providing an alternative public voice, and the reform process has been shockingly vague on this issue.
 5. The time has come for the U.S. Government, in conjunction with other global stakeholders, to take a more active role in ensuring that ICANN meets these requirements for limited powers, accountability, and representation.
 - These requirements, with meaningful benchmarks, should be made obligations in whatever Memorandum of Understanding is signed by the Commerce Department with ICANN this year.
 - They should be conditions for continued support of ICANN by the U.S. and other governments.
 - The Commerce Department should report back to Congress on progress toward these benchmarks this fall and regularly throughout the coming year.

The time for action is now. In the next few months, ICANN will make key decisions affecting its future structure and activities. It should do so with the knowledge that the US government and other global stakeholders are watching carefully, and that time is running out.

We commend the Subcommittee for holding this hearing. For many public interest groups and non-commercial participants who feel disenfranchised at ICANN, Congress and the Commerce Department have become a forum of last resort. We look forward to working with you and with the Internet community to make ICANN a more trusted and accountable steward of critical public resources.

The Center for Democracy and Technology is a 501(c)(3) non-profit, public interest organization dedicated to promoting civil liberties and democratic values on the Internet. CDT is a member of ICANN's Non-Commercial Constituency and has attended the last ten global ICANN meetings. CDT, with the support of Markle Foundation, co-authored two major studies of ICANN governance: *ICANN's Global Elections: On the Internet, For the Internet*, (March 2000); and *ICANN, Legitimacy, and the Public Voice: Making Global Participation Work* (September 2002), as part of the NGO and Academic ICANN Study (NAIS) collaboration of international researchers studying ICANN's governance structure.

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Extended Statement for the Record

1. CDT still believes in the concept of a non-governmental, globally representative, bottom-up technical management organization.

The Internet's great promise to promote economic opportunity, civic discourse, and the free flow of information relies largely on its open, decentralized nature. Yet even such a decentralized network of networks relies heavily on and benefits greatly from centralized mechanisms to coordinate certain aspects of naming, addressing, and protocol assignment. The way these centralized systems are managed has potentially broad implications for consumers, companies, and communities around the world.

The Internet Corporation for Assigned Names and Numbers (ICANN), now three years old, is an unprecedented experiment in open management of these important global technical resources. Although ICANN in 2002 is in need of serious reform, CDT continues to support the concept behind ICANN and expressed by the Commerce Department in 1998.

While the US government had a critical leadership role in building and maintaining many of these Internet coordination mechanisms, it alone cannot forever maintain responsibility for coordination of global Internet resources. As the Internet has grown in importance worldwide, it is to be expected that global stakeholders will appropriately demand a role in the management of these systems – and should accept their appropriate responsibilities to support those systems.

We believe a private-sector body remains the approach most likely to reflect the needs of the Internet community, so long as it is:

- Non-governmental – to benefit from more nimble private sector capabilities to handle fast-paced, complex Internet technical decisions, and more likely to reflect the diversity of user interests.
- Bottom-up and consensus oriented – making decisions in the best traditions of Internet bottom-up processes designed to account for broad interests
- Narrowly focused – to create trust that it would not exercise undue power and to increase comfort in its non-governmental character
- Globally representative – to ensure both public accountability and to include the interests of stakeholders affected by its decisions.

Alternative mechanisms remain unattractive. Multi-lateral government organizations like the ITU or

UN are widely viewed as unlikely to move with the pace or technical sophistication needed, and are less reflective of diverse consumer perspectives. The Commerce Department alone is likely to be an unacceptable global coordinator in the long run. And no obvious private sector entity at this time exhibits the characteristics thought to be needed.

The Department of Commerce formative documents on naming and numbering management – the White Paper and Green Paper – reflected these principles: Stability, Competition; Private, bottom-up coordination; and Representation.¹ They also included an early reflection of the notion that ICANN’s mission should be as narrow as possible.²

It was under this stated framework that the Department of Commerce in 1998 ultimately selected ICANN.³ These principles were part of a broad understanding of ICANN’s mandate at its creation and were viewed by many, including CDT, as part of the conditions for their support of ICANN and the Commerce initiative. As such they continue to be important metrics in judging ICANN’s performance since 1998.

2. ICANN has not lived up to that vision, and risks becoming an increasingly unaccountable global regulator of important Internet activity.

ICANN has made notable progress in several areas, arguably most evident in increasing competition, introducing a first set of new top-level domains (though more slowly and with greater problems than many would have liked), and developing trademark dispute-resolution procedures. In other essential areas, ICANN has failed to live up to the promise put forward at its conception. ICANN President Stuart Lynn acknowledged as much in February when he wrote, “many of those critical to global coordination are still not willing to participate fully and effectively in the ICANN process... [ICANN] has not become the effective steward of the global Internet’s naming and address allocation systems as conceived by its founders. Perhaps even more importantly, the passage of time has not increased the confidence that it can meet its original expectations and hopes.”⁴

Most critically, we believe the essential question facing ICANN, from which all else flows, is the exact scope of its authority and powers, today and over time.

¹ DNS Statement of Policy (“White Paper”), National Telecommunications and Information Administration, June 5, 1998. Available at <http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm>.

² The White Paper stated that the new management body’s policies and practices should be “no broader than necessary to promote the legitimate coordinating objectives of the new corporation.” *Ibid*.

³ Significant debate has arisen about whether Commerce’s solicitation of a private body to manage these resources violated either the Administrative Procedures Act or the Constitution’s nondelegation doctrine. See A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 Duke L.J. 17 (2000).

⁴ M. Stuart Lynn, “ICANN – The Case For Reform,” February 24 2002. Available at <<http://www.icann.org/general/lynn-reform-proposal-24feb02.htm>>.

ICANN lacks a clear community understanding of its mission and meaningful constraints on its power.

While ICANN was originally conceived as a narrow technical manager, it has increasingly acted as a broader policy-maker, demanding massive and detailed contracts with registries, making subjective and at times arbitrary decisions, and reducing trust that there are meaningful limits on its powers.

On the highly decentralized Internet, ICANN's emerging central authority over critical aspects of naming and numbering gives it the *potential* to exert tremendous control over Internet activity. Its contracts could give ICANN the potential to exert power directly over registries and registrars (and RIRs and root-server operators), and indirectly over end users by placing conditions on the use of domain names or IP numbers.

ICANN's current Board has admirably indicated its commitment to a "narrow" mission for ICANN. But many questions remain about the exact scope of ICANN's power. Moreover, future ICANN boards will face both external pressure and internal temptation to take on increasing activities and assume additional power – unless meaningful constraints are placed on their ability to do so.

Within the Internet community there are many different definitions of ICANN's appropriate mission and activities. The idea that ICANN's mission is "mere technical coordination" has been eroded by an understanding that ICANN's decisions have not been purely "technical" in nature, but rather have broader "policy" impacts. The idea that ICANN's mission is "narrow" and limited is being challenged by concerns about its expansion through "mission creep" to date and in the future.

Examples of ICANN actions that have raised questions about "mission creep" include:

- The size and scope of its massive contracts with new gTLD operators, including detailed limitations on business plans and marketing requirements.
- The selection of new gTLDs. ICANN's final selections were based on subjective and even arbitrary criteria, such as how strings sounded when pronounced, or the Directors' fondness for certain spellings. Decisions once taken were unappealable, and the Board never fully justified its decisions.
- Recent consideration of Internet "keywords" policies, where the Board ultimately took no action, but an area not obviously included in ICANN's list of name, number, and protocol responsibilities

Without debating the merits of these actions – we likely agree with many of the motivations behind them – together they are indicative of why many question whether there is a common understanding of ICANN's mission that is either "narrow" or based on "technical coordination." Moreover, some have already called for ICANN to have a greater role promoting goals such as consumer protection

online, assistance collecting Internet taxes, or regulation of content.

The mission problem is made worse by the absence of any mechanism to serve as a check on the Board. This past March, ICANN abandoned as unworkable the notion of an Independent Review Panel (IRP), one of the key accountability mechanisms in the Department of Commerce's MoU. In early June ICANN proposed replacing the IRP with a non-binding system of international arbitration – a proposal that has attractions but that many find lacking.

Even if ICANN manages to assemble a new IRP, its effectiveness will be limited unless ICANN establishes a meaningful community understanding of its powers and their limits. Our suggested reforms below outline how ICANN could more effectively do so.

Bottom-up, consensus-oriented policy development is failing in key areas at ICANN.

ICANN's founding conceptual documents, the Green and White Papers, called for "private bottom-up coordination" as the governance model for ICANN. Despite early attempts at consensus-based decision-making, authority in ICANN increasingly rests at the top, with the Corporation's nineteen-member Board of Directors.

Bottom-up processes have the benefit of placing policy development in the hands of those technical experts, companies, and individuals most expert and those most affected by policies. If done properly, it can also ensure that there are opportunities for the voices of affected stakeholders to be heard at the early stages of policy development.

This bottom-up approach has worked well in ICANN's Address and Protocol Supporting Organizations, which remain largely technical in nature. Increasingly, however, the process has not worked in the context of the Domain Name Supporting Organization, which has generated most of ICANN's controversial policy discussions. Today, policies are increasingly generated by staff and decided by the Board. As a result, the benefits and guarantees of fairness offered by a consensus-oriented process have not been realized.

The voice of consumers and users is not adequately represented at ICANN.

Even with a narrow mission, ICANN makes decisions of interest and importance to consumers, Internet users, and the non-commercial community. Yet these groups are largely underrepresented in ICANN's structure, and ICANN appears to have abandoned efforts to establish meaningful representation for users at the real locus of ICANN decision-making, the ICANN Board.

A single Non-Commercial Constituency serves all non-commercial interests at ICANN (individuals and user advocates have no formal constituency), and it is only one of seven groups making up one of the three supporting organizations. ICANN's meetings pursue the admirable goal of global inclusiveness by meeting all over the world, but few individuals or NGO's have the resources to attend. CDT's own experience has been that the ICANN community is receptive to thoughtful input,

but that it requires an ongoing effort to be effective. In our case, that effort was only possible through the generous support of the Markle Foundation, and many are not so fortunate.

The main hope for a public voice and accountability in ICANN has been the promise that half the board would be selected “At-Large” by the user community – indeed, ICANN’s initial bylaws explicitly provided for nine At-Large Directors on a nineteen-member Board.⁵ To date there has been a great deal of debate about the selection mechanism for At-Large Directors, in which CDT has commented extensively. Five of the nine At-Large directors have been elected (the seats were otherwise filled with appointed directors), in a global election with many flaws but widely viewed as producing legitimately selected Board members.

While elections remain a controversial – and we believe still poorly understood – method of including the user’s voice, it is shocking how ICANN’s current reform effort has abandoned them without putting a clear user representation mechanism in their place. ICANN’s own At-Large Study Committee, chaired by no less an eminent figure than former Swedish Prime Minister Carl Bildt, recommended a modified election system for selection of directors—a substantial effort now abandoned by the Board.⁶

In March the ICANN President proposed that foreign governments select Directors. The most recent reform proposals would have the seats on ICANN’s board once reserved for At-Large user selection be filled by a Nominating Committee selected by ICANN’s Board. Such processes provide a pale shadow of the accountability and user representation expected from the At-Large process. While elections may be controversial, the onus remains on the ICANN Board to show how its new process will provide an adequate voice for users.

3. Major reforms are necessary if ICANN is to succeed.

The ICANN community has recognized the need for change, and a great deal of work has already gone into the reform process. The reform paper presented this winter by President Stuart Lynn, while controversial in many ways, deserves credit for its honest assessment of the challenges facing ICANN and its attempt to find new solutions. The hard-working Committee on ICANN Evolution and Reform has made good progress in some areas, and appears to have reaffirmed some of the basic principles of non-governmental, transparent structure that were hallmarks of ICANN’s original conception.

In three main areas we believe the reform efforts should do more if ICANN is to succeed.

⁵ ICANN bylaws, adopted November 6, 1998. Available at <<http://www.icann.org/general/archive-bylaws/bylaws-06nov98.htm>>.

⁶ CDT also participated in an independent effort to review the 2000 election and suggest ICANN’s course for the future. Known as the NGO and Academic ICANN Study (NAIS), the group encompassed researchers and experts from around the world. Its final report, *ICANN, Legitimacy, and the Public Voice: Making Global Participation and Representation Work*, is available at <<http://www.naisproject.org/report/final/>>.

ICANN must find ways to limit its powers to promote trust.

ICANN needs a focused and narrow mission, clearly defined, with real checks on its powers that people can point to and understand. Without a narrow mission, ICANN will need a much broader – and likely unsustainable – policy-making mechanism to ensure its accountability to affected stakeholders and the public. Without a narrow mission, ICANN is unlikely to gain the trust of those it wishes to sign contracts with, such as the country code registries (ccTLDs), RIR address registries, or root server operators – all who may fear a future and overbearing ICANN.⁷

The current reform effort has taken steps to define ICANN's mission, producing two helpful papers describing what ICANN believes it does and should do. This work does not go far enough, nor has ICANN yet taken steps to put serious constraints on its powers. Two examples illustrate the difficulty faced:

- The “What Does ICANN Do” paper release this fall includes this straightforward item: ICANN “defin[es] the content of the root zone file, which means maintaining and updating the list of recognized TLDs and the name servers for each TLD.”⁸ But *how* does it do that? ICANN could select new TLDs based on relatively objective criteria, even using a lottery to select among similarly qualified candidates. Or ICANN could select new TLDs based on highly subjective criteria or those designed to promote goals like increasing competition, addressing the digital divide, or stopping piracy. Clearly the second model vests far more discretion – and far more power – in the hands of the Board than the first.
- The reform committee's paper on mission puts forward a helpful framework of “values” designed to limit ICANN's mission. Among them: “limit[s on] ICANN's activities to those matters within ICANN's mission requiring *or significantly benefiting from* global coordination.”⁹ Such wiggle room makes it very difficult to trust that a future board will be constrained from calling nearly any proposed activity that affects the DNS an activity “benefiting from global coordination.”

Reforms to ICANN, then, should include both substantive limits on the powers granted to ICANN and procedural safeguards that govern the ways those powers are exercised. Substantive limits could include:

- *Enumeration of powers in the ICANN charter and bylaws.* The ICANN charter and bylaws should explicitly enumerate the powers it may exercise. We believe those core functions to

⁷ With a broad mission, ICANN will be increasingly forced to make decisions in areas where it has no competency – such as the economics of gTLD allocation, or consumer protection on the Internet, or who is qualified to be in .churches or .union.

⁸ “What ICANN Does,” March 10 2002. Available at <<http://www.icann.org/general/toward-mission-statement-07mar02.htm>>.

⁹ “Working Paper on ICANN Mission and Core Values,” May 6 2002. Available at <<http://www.icann.org/committees/evol-reform/working-paper-mission-06may02.htm#ICANNMissionStatement>>.

be few in number, and could be limited to issues:

- for which central and coordinated resolution is necessary to assure stable interoperability of the domain name and address system;
 - directly related to the safety and integrity of registration data;
 - directly related to the availability of accurate WHOIS data; and
 - directly related to the resolution of disputes regarding the registration of particular domain names (as opposed to the use of such domain names) by particular parties.
- *Explicit prohibition of certain activities.* If powers cannot be limited to a clear list, ICANN could adopt a formal declaration of activities in which ICANN may never engage. The reserved powers could, for example, generally guarantee individuals and companies around the world basic protections for their property, certain basic liberties, or their expectation to be treated fairly and with due process.
 - *Directive of limited action.* The two examples above indicate the difficulty in creating a simple list of permitted activities; the way those activities are executed can make a big difference. ICANN should consider an overriding directive of limited action – that is, as a guiding principle it will act in a limited way and as objectively as possible, avoiding subjective policy-making unless they are narrowly tailored and there are no less objective alternatives.

The substantive limits on ICANN's powers described above must be bolstered by procedural safeguards to ensure their effectiveness:

- *Limits on amendment power.* Codified limitations and rights provide an incomplete guarantee without restrictions on their future amendment. ICANN has amended its bylaws eleven times, and changes to the ICANN charter and bylaws require a two-thirds vote of the Board. That standard should be raised to three-fourths where changes implicate the scope of ICANN's power or the rights of users, and such changes should not be commonplace.
- *Independent review and enforcement of limitations and rights.* The only institution responsible for reviewing the Board's activities is the Board itself. ICANN needs a check to give assurance that limitations will be enforced. (See below)

Reforms must increase ICANN's accountability and transparency in its activities.

- *A better Independent Review process:* ICANN has largely abandoned its critical accountability mechanism, the Independent Review Panel (IRP). ICANN's proposal that alleged bylaws violations be subjected to international arbitration has merit, but is non-binding and its costs may discourage many claims with merit. ICANN's complexity may make commercial arbitration a poor fit, better left to respected experts in the issues ICANN faces. Commercial services designed to weigh the interests of private companies against one another are unlikely to succeed at measuring the activities of ICANN (a private organization

with public responsibilities) with the interests of the global Internet community.

ICANN's latest MoU with the Department of Commerce still requires it to provide for external review of its decisions, and we urge Commerce to maintain this provision.

- *Fair administrative procedure and reporting.* ICANN should adopt procedures guaranteeing the openness and fairness of its activities. All decisions and meetings should be fairly noticed, input should be openly taken, documents should be made widely available, and stakeholders should be provided with detailed reasoning behind decisions made both by the ICANN Board and staff. We note that some progress has been made in this area by the reform committee, though more needs to be done.
- *Board and staff codes of conduct.* At present there is no adopted standard for measuring the performance of the Board and staff or providing a baseline of acceptable behavior. ICANN should adopt a code of conduct for all its Board members and staff.

The public's interests must be represented at ICANN.

At-Large representation of users was a critical part of its initial conception and was pointed to by ICANN's leaders in gaining political support for ICANN. For example, in a November 1998 letter to Department of Commerce representative J. Beckwith Burr, then-ICANN Chairwoman Esther Dyson wrote, "Some remain concerned that the Initial Board could simply amend the bylaws and remove the membership provisions [establishing an At-Large Membership and election]. We commit that this will not happen." Tellingly, ICANN now is at the point of removing those same provisions from its bylaws, with no accountability for that action.

Elections are not the only method of ensuring that broad consumer, user, and public interests are represented in the Board's activities. Some of the alternatives – and their relative merits – are outlined in the NAIS September 2002 report, *ICANN, Legitimacy, and the Public Voice*. But a strong form of public representation was a key part of the original deal that led to the creation of ICANN, and ICANN made strong public commitments as an original matter to adhere to the deal. If ICANN rejects elections as a feasible means of implementing this principle, then the onus is on it to substitute another effective alternative. To date the reform process has not done so.

We note that ICANN has made a welcome recommitment to increasing user participation through a new At-Large supporting organization. But it faces an uphill battle to get individuals engaged in ICANN with few guarantees their voices will be heard or represented at the Board.

4. Congress and the Department of Commerce have important roles to play in putting ICANN back on the right track.

ICANN is at a crossroads, and the next six months will be critical to its future. The time has come for the U.S. Government, *in consultation with and in conjunction with other global*

stakeholders, to take a more active role in ensuring that ICANN meets requirements for limited powers, accountability, and representation.

A large measure of ICANN's authority derives from its Memorandum of Understanding (MoU) with the Department of Commerce. The MoU includes such responsibilities as establishing an external review process for ICANN activities (still incomplete) and providing for the security of the root server system. Other responsibilities, such as establishing user participation in policy development, were originally in the MoU but were removed by Commerce in 2000. The removal of those responsibilities now appears premature.

The MoU is set for renewal in September. If it is renewed (and some have argued that it should not be), Congress and the Commerce Department should use this opportunity to exercise greater oversight over ICANN:

- Any renewal of the MoU should add new obligations regarding mission, accountability, and representation that explicitly require:
 - Enumeration of ICANN's powers and prohibition of certain activities;
 - Procedural reforms, including a directive of limited action;
 - Establishment of an independent mechanism to interpret and enforce the scope of ICANN's powers;
 - Representation of consumer and user interests at key levels of ICANN decision-making, including the Board; and
 - Effective mechanisms of user participation in the ICANN process.
- These requirements should be conditions for continued support of ICANN by the U.S. and other governments
- The Commerce Department should take a more active oversight role, both in providing guidance to ICANN and information to the Congress and public. At a minimum, Commerce should report back to Congress on progress toward these benchmarks this September and regularly throughout the coming year

We note that some have called on Commerce to “re-bid” the MoU and seek competitors to ICANN. A recent expression of this sentiment came on May 29, when fourteen non-profit organizations signed a letter asking Commerce to “re-compete” its three agreements with ICANN.¹⁰ While CDT has not joined the call to replace ICANN – we do not feel comfortable doing so without a clear understanding that there is a better alternative – we share many of the concerns expressed in that letter.

4. Conclusion

The time for action is now. In the next few months, ICANN will make key decisions affecting its

¹⁰ Available at <<http://www.mediaaccess.org/filings/DoCrebidfinal.pdf>>.

future structure and activities. It should do so with the knowledge that the US government and other global stakeholders are watching carefully, and that time is running out.

Congress has an important role providing oversight and guidance to both ICANN and the Department of Commerce. This hearing sends an important signal that this Congress recognizes the issues at stake in ICANN. We look forward to working with you, the Commerce Department, the ICANN Board and staff, and the greater ICANN community to make ICANN a more trusted and accountable steward of the critical public resources it manages.